SUPREME COURT, U. S.

MAY 3 1974

MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1649

DOUGLAS JOHN EYRAUD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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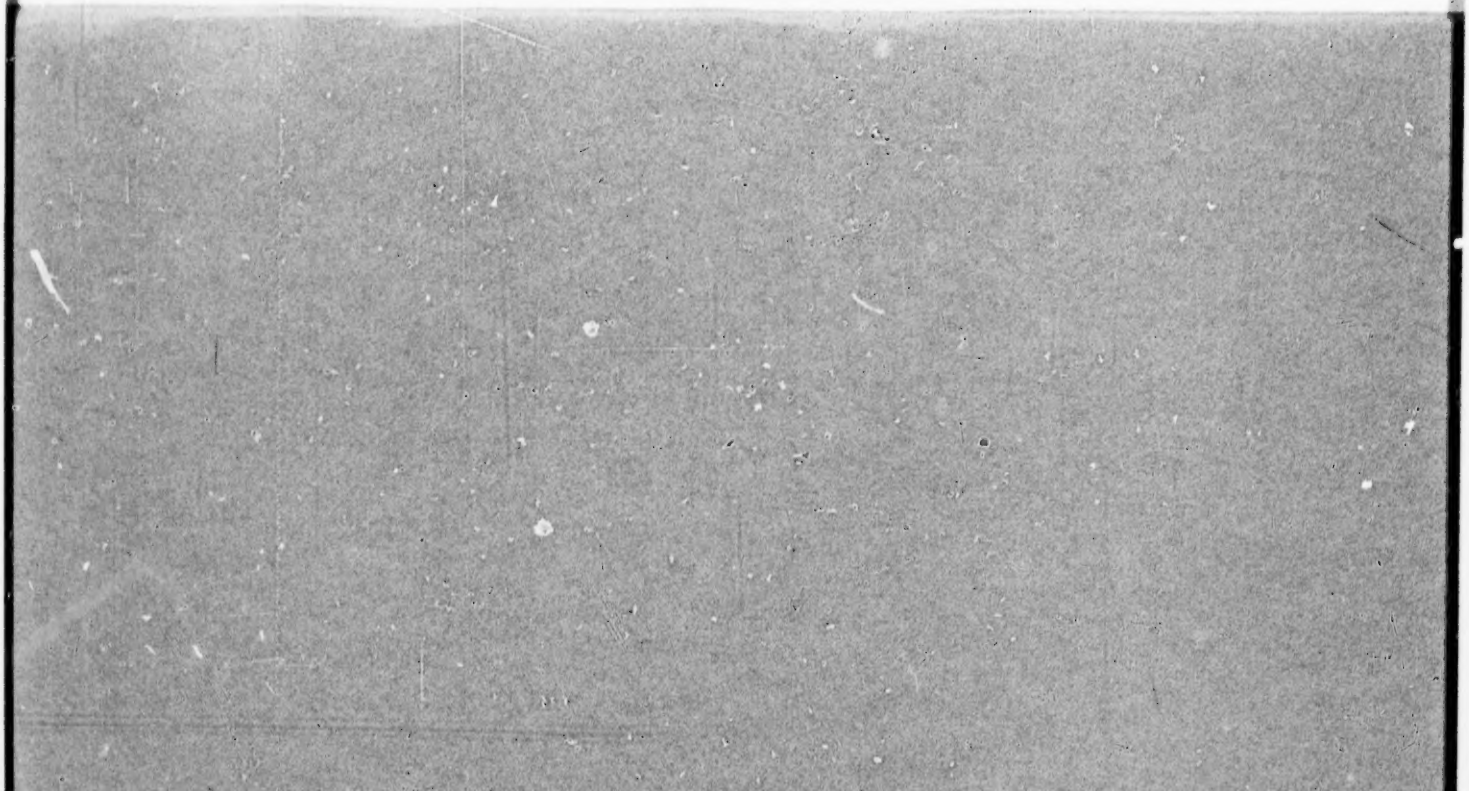

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The petitioner DOUGLAS JOHN EYRAUD prays that the writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on January 7, 1974, and the Order denying Petition for Rehearing on April 5, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the Eastern District of California appears as Appendix A, infra, p. A-1. The order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and the suggestion for a Rehearing en Banc appears at Appendix B, infra, p. B-1.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing was entered on April 5, 1974. See Appendix B, p. B-1. infra. This Petition for certiorari was filed within thirty days after the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The United States Attorney, in the United States District Court, Eastern

District of California, by indictment subsequent to a preliminary probable cause hearing, caused the petitioner to be charged with one count of violation of Title 18, U.S.C. §2113(a), Bank Robbery.

In determining the primary issue of whether the petitioner was denied due process of law, the following questions are to be considered:

1. Whether the Government counsel committed wilful misconduct, leading to prejudicial error, in questioning the petitioner as to a prior felony conviction, where:

a. Government counsel did not have proper legal proof of such conviction; and where

b. The trial court allowed said inquiry by Government counsel without admonishing the jury to disregard said question.

2. Whether the failure to report the colloquy, argument, discussions and rulings at the bench precluded petitioner from advancing all proper legal and factual arguments under the laws and the Constitution of the United States in his behalf.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF FACTS

On December 21, 1970, petitioner entered his plea of not guilty to the charge of Bank Robbery, in violation of 18 U.S.C. §2113(a), subsequent to a preliminary probable cause hearing on November 20, 1970 which resulted in an indictment therefor in the United States District Court, Eastern District of California.

On January 3, 1973, petitioner's jury trial was commenced; on January 5, 1973, the jury rendered its verdict of guilty as charged in the indictment; and on April 30, 1973, petitioner DOUGLAS JOHN EYRAUD was sentenced to a term of imprisonment of seven years.

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in summary fashion.

Government Counsel's Inquiry As to a Prior Felony Conviction

On the last day of a three-day trial, January 5, 1973, on cross-examination of petitioner by Government counsel, petitioner was asked if he had previously been convicted of a felony. His answer was that he had not.

There followed an unreported colloquy at the bench. The Court stated that it was going to be necessary to take the noon recess, and the case was recessed.

At 1:30 p.m., in proceedings outside the presence of the jury, Government counsel requested permission to further examine the petitioner, informing the Court that he had been informed that petitioner had entered a guilty plea to first degree robbery in Orange County Superior Court, and was to be sentenced on a calendared date of January 19, 1973, some fourteen days hence.

Government counsel also stated that he was advised that morning, January 5, 1973, prior to asking the question, that his office had not obtained a certified copy of the conviction.

The Court then demonstrated its concern based on the Court's understanding that the plea was entered by petitioner as part of a plea bargain, and that if petitioner was to be placed on probation then he "hasn't been convicted of a felony," and that in the opinion of the Court it would be unfair to proceed.

The Court inquired of Government counsel whether or not he had a certified copy of the record, and counsel replied that he did not. The Court stated it could not accept it as valid, and sustained petitioner's objection to going into the matter as a prior felony conviction.

Wilful Misconduct On the Part of the Prosecution

Petitioner contends that wilful misconduct on the part of the prosecution is established by the lack of good faith

shown in questioning petitioner as to whether he had a prior felony conviction, based on the following:

1. The initial inquiry here was in bad faith. By his own admission, the prosecutor knew prior to cross-examination of petitioner that he had not sought or received the records and, in fact, a certified copy of Minute Order of the Orange County Superior Court was not sought by the prosecution until after the matter was brought to the attention of the jury.

2. Here the prosecution knew or should have known that, in addition to its lack of documentary proof, the Orange County proceeding raised legal questions as to whether or not that guilty plea, based on a plea bargain, constituted a conviction for purposes of impeachment.

3. It is uncontroverted by Government counsel that the question of admissibility for impeachment of a guilty plea prior to imposition of sentence and punishment is unsettled and appears to be discretionary with the court. The prosecution here, however, failed to give the trial court the opportunity to make an advance ruling,

in accordance with established procedure.

Prejudicial Error

Petitioner contends that as a result of the aforementioned conduct by the prosecution, prejudicial error occurred, as a result of the time that the jury had to contemplate the purpose for which the prosecution put forth the improper question as to prior conviction of a felony.

In a trial lasting three days, it is particularly noteworthy that on the first and second days of this trial the jury was ordered to return at 1:30 p.m., after the noon recess, and the trial resumed in the presence of the jury promptly at 1:30 p.m.

However, on the last day of the trial, the noon recess was called immediately after defense counsel's request to approach the bench, in response to the improper questioning of the accused by the prosecution as to a prior felony conviction.

Although the jury was ordered to return at 1:30 p.m., they were not summoned to the jury box until sometime between

2:15 and 3:00 p.m., during which time counsel argued the issue out of their presence. When the jury was finally recalled and petitioner resumed the stand, the prosecution stated "no further questions."

The jury was thus left with considerable time to speculate about the issue during the noon recess and well into the afternoon session, long past the normal time to resume the trial which had been established by the procedure followed in the preceding two days of trial.

Court's Failure to Admonish the Jury

The prejudicial error was compounded by the Court's failure to admonish the jury to disregard this totally improper question by the prosecution, or to give any limiting instruction thereon.

Unreported Argument Raises Issue of Denial of Procedural Due Process

The trial transcript is replete with numerous unreported colloquies between court and counsel at the bench. Many of

these unreported discussions resulted in the overruling or sustaining of objections which were not reported in the transcript.

The result of this unreported activity was to raise a problem for both prosecution and defense attorneys as they attempt to decipher the record and determine on what basis the Court made some material rulings.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the principles enunciated in both Federal and State Court decisions on the requirement of documentary evidence that the witness has suffered a prior conviction.

In People v. Perez, 373 P.2d 617, the California Supreme Court noted:

> "...As stated in People v. Craig, 196 Cal. 19, 28, 235 P. 721, 'The usual manner of making proof of a prior (felony) conviction is to ask the witness who has suffered such a conviction if he had been theretofore convicted of a felony, and if he denies that

he has been so convicted, to produce a copy of the judgment of conviction.' The clear implication of the latter statement in Craig is that the questioner should be prepared to show by documentary evidence that the witness has suffered a prior conviction, in the event of a denial thereof. (Citations.) In a recent case a witness for the defendant was asked on cross-examination: 'Isn't it a fact that in Cleveland, Ohio in 1934 you were convicted of the felony of embezzlement?' The witness responded 'that it was not a fact.' The appellate court concluded: 'In the absence of an intention to prove this former conviction, and there was no offer of proof, the question was improper.' (People v. Lo Cigno, 193 C.A.2d 360.) It has also been announced in other jurisdictions that an interrogator, in order to avoid a charge of misconduct, must be prepared to follow up with proof

questions of a witness concerning prior felony convictions. (State v. Herrera, 8 Utah 2d 188; other citations)."

The Federal Courts appear to be in accord with the various state authorities cited. In Ciravolo v. United States, 384 F.2d 54, the court stated:

> "To ask a defendant whether he has had criminal convictions without prosecution's possessing a certified copy of the record is fraught with possibilities of error, and reviewing court should be slow to find that any such error is not prejudicial."

See also United States v. Haskell, 327 F.2d 281, which holds that one must have support for the question.

The requirement of "good faith," i.e., possession of documentary evidence to prove the prior conviction, is sometimes stated as a basic requirement for even the simple question itself. People v. Conover (1966) 243 Cal.App.2d 38, 53.

In People v. Bryson (1967) 275 Cal.App. 2d 201, the court held such questioning to be improper unless the prosecutor is prepared to show documentary evidence of felony conviction.

People v. Romero (1966) 244 Cal.App.2d 495, held that the law forbids a prosecutor to ask a defense witness whether he has been convicted of a felony unless the question is asked in good faith with the expectation of proving the conviction.

Where, as here, the prosecution knew or should have known that, in addition to its lack of documentary proof, the Orange County proceeding which Government counsel used as the basis for the inquiry as to a prior felony conviction raised at least two legal questions:

> (1) Whether a guilty plea prior to imposition of sentence and punishment constitutes a conviction for purposes of impeachment; and
>
> (2) Whether a prior felony conviction relating to an offense committed after the crime charged constitutes a conviction for purposes of impeachment,

the prosecution's act of inquiring on cross-examination of petitioner without first presenting these questions to the Court for determination outside the presence of the jury was done in bad faith.

Under California decisions, the proof must show conviction of a felony, not a misdemeanor, and the test laid down in the substantive criminal law--the nature of the punishment--is determinative. Where a crime may be either a misdemeanor or a felony, depending on the punishment imposed therefor, it is the punishment specified by the sentence which determines the character of the crime "for all purposes" (Calif. Penal Code §17), including that of impeachment. Hence, where a defendant had been convicted of second degree burglary, but was sentenced to a county jail term, it was error to introduce the record of his conviction, as held in People v. Hamilton (1948) 33 Cal.2d 45, 49.

The prosecution here, however, failed to give the trial court the opportunity to make an advance ruling, in accordance with established procedure for determining the admissibility of prior convictions for

impeachment. United States v. Puco, 453 F.2d 539; United States v. Isaac, 449 F.2d 1040; United States v. Costa, 425 F.2d 950; United States v. Palumbo, 401 F.2d 270.

Thus, by improper questioning of the accused before the jury, irreparable harm was suffered by the appellant.

The error heretofore committed was further aggravated by the trial court's failure to give a limiting instruction as to the improper question put forward by Government counsel.

As was stated in United States v. Graham, 325 F.2d 922:

> "Cross-examination of defendants during which inference was made that defendants were drug addicts...was so prejudicial as to require a new trial notwithstanding defendant's failure to object or request any action by the trial judge."

In accord is United States v. Norman, 402 F.2d 73, where it was held that extrinsic evidence as to specific misdeeds may

be inquired into for purposes of impeachment only where convictions resulted.

2. The decision below raises the issue of procedural due process with regard to the unreported colloquy, argument, discussions and rulings at the bench.

Although petitioner's counsel could find no cases that were directed specifically to the issue considered herein, the unreported discussions at the bench must be viewed in the entire context of procedural due process.

As stated in 80 A.L.R.2d 1382:

> "The United States Supreme Court has said that a state's control of the procedure in its courts in criminal cases is subject to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. In short, prosecutions for crime must comport with the requirements of procedural due process. Brown v. New Jersey, 175 U.S. 172."

It is petitioner's contention that it necessarily follows that the same rule is applicable in a Federal Court.

Quoting further from 80 A.L.R. 2d 1382:

> "The idea of fairness is inherent in the requirement of due process of law. It is settled that due process is denied an accused where he is deprived of that fundamental fairness which is essential to the very concept of justice."

Although the above citation concerns itself with a conviction on a no-evidence basis, the authorities cited there are equally appropriate to the argument here.

Where, as here, petitioner is denied the opportunity to advance all proper legal and factual arguments under the laws and the Constitution of the United States in his favor, the problem becomes a most material procedural due process issue and necessitates that a new trial be granted in order to protect petitioner's fundamental rights.

In Todorow v. United States, 173 F.2d 439, the Court stated:

> "Where no one incident in trial was sufficient to warrant reversal, incidents must be considered in their natural and proper setting, namely, the entire record, to determine whether, in the aggregate they adversely affected defendant's substantial rights."

It is suggested that it is the totality of the circumstances discussed herein, when viewed in the concept of due process and fundamental fairness requirements, become substantial and prejudicial error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOSEPH T. VODNOY

Attorney for Petitioner

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DOUGLAS JOHN EYRAUD, *Defendant-Appellant.*	No. 73-2219 MEMORANDUM

[January 7, 1974]

Appeal from the United States District Court for the Eastern District of California

Before: MERRILL and TRASK, Circuit Judges, and GRAY,* District Judge.

We find the evidence fully sufficient to support the conviction. *See Darden v. United States*, 405 F.2d 1054, 1056 (9th Cir. 1969).

The appellant complains of having been asked on cross-examination whether he had a prior felony conviction. The question was asked in good faith, for the prosecutor had been reliably informed that the appellant recently had pleaded guilty in the Orange County Superior Court to the offense of armed robbery. The appellant answered "no" to the question, and a side bar conference followed. The court listened to arguments of counsel as to whether, under California law and under federal law, a plea of guilty, of itself and in advance of sentencing, constitutes a conviction. The court thereupon declined to seek to resolve this legal issue in order not to run the risk of making a wrong decision in a matter of "so

*The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

little probative value," and he ruled that the subject might not be pursued further before the jury.

We find that the appellant was not unduly prejudiced under the circumstances, and we too withhold ruling on the technical legal question involved.

The appellant finally contends that certain colloquys at the bench were not reported or were only partially reported. However, no motion has been made to augment the record, and the appellant does not make any showing of prejudicial error occurring in any such instance.

The judgment of conviction is affirmed.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DOUGLAS JOHN EYRAUD, Defendant-Appellant.	FILED Apr 5 1974 No. 73-2219 O R D E R

Before: MERRILL and TRASK, Circuit Judges, and GRAY, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1649

DOUGLAS JOHN EYRAUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that it was reversible error for the government to ask petitioner, allegedly in bad faith, about prior convictions and for the trial court to fail, *sua sponte*, to instruct the jury to disregard the question. Petitioner also contends that the court reporter's failure to report in full certain colloquies at the bench was a denial of due process.

After a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to seven years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that at 5:50 p.m. on November 5, 1968, petitioner and Jack Eskew robbed the Community National Bank of Pumpkin Center, California. Eskew entered the bank, armed and alone, while petitioner acted as a lookout. After obtaining approximately forty-six thousand dollars, Eskew fled the bank and climbed into the trunk of a waiting car driven by petitioner (Tr. 26-30, 33, 79).

At trial, petitioner was asked on cross-examination whether he had ever previously been convicted of a felony. Petitioner replied that he had not. Defense counsel then requested permission to approach the bench. The noon recess was taken at that time (Tr. 273-274).

Out of the presence of the jury, the prosecutor stated that he had been informed by the District Attorney's Office in Santa Ana, California that, six weeks before the instant trial, petitioner had pleaded guilty to a charge of first degree robbery in the Orange County Superior Court. The prosecutor further stated that he had requested a certified copy of the conviction (Tr. 275). After argument as to whether a plea of guilty, in advance of sentencing, constitutes a conviction for impeachment purposes, the court ordered that the subject not be pursued in the presence of the jury (Tr. 276-286).

1. Petitioner contends that it was reversible error for the government to ask petitioner, allegedly in "bad faith," whether he had ever previously been convicted of a felony and for the trial court to fail to instruct the jury to disregard the question.

Contrary to petitioner's claim, and as the court of appeals noted, "the question was asked in good faith, for the prosecutor had been reliably informed that the appellant recently had pleaded guilty in the Orange

County Superior Court to the offense of armed robbery" (Pet. App. A-1). Moreover, the government had requested a certified copy of the conviction and had only recently been advised that no copy had as yet arrived (Tr. 275).

Defense counsel did not request that the trial court admonish the jury to disregard the question in issue. Counsel may well have concluded that in light of petitioner's firm denial of ever having previously been convicted of a felony, a judicial admonishment would tend only to stress the issue to petitioner's disadvantage. The trial concluded without any further reference to a criminal record. There is thus no evidence or reason to believe that petitioner was prejudiced by this episode.

2. Petitioner's contention that the failure to report in full the colloquies at the bench constituted a denial of due process is frivolous. No motion to augment the record was made and petitioner has made no showing of prejudice with regard to this claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

DOJ-1974-07